FILE COPY

DEC 12 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 312.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, ET AL., *Appellants*,

-v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Appellees*.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES.

W. N. MCGEHEE,
CHARLES CLARK,
JAMES F. WRIGHT,
FRANK W. GWATHMEY,
Attorneys for Atlantic Coast Line RR. Co., et al., Appellees.

December 12, 1935.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
Opinion of the court below	1
The statute involved	2
Statement of case	2
The order complained of by appellants	3
The issues on this appeal	7
Summary of argument	8
Argument	9
I. Both the Commission and the District Court having considered and refused to recognize the reliability of appellants' cost calculations, offered as proof of the alleged confiscation, their concurrent conclusions upon such question of fact will be accepted as final on appeal	9
1. The procedure adopted for proving confiscation	9
2. Appellants' basic formula for computing costs of the citrus fruit transportation was fully placed before the Commission and was rejected after due consideration by the Commission	13
3. The District Court also, after hearing additional evidence, refused to recognize the reliability of appellants' cost calculations offered as proof of the alleged confiscation	19
4. Appellants' supporting evidence offered before the District Court fails to justify their use of computed system average unit costs	23
(a) Effect of traffic density upon transportation costs per unit of traffic	23
(b) Pyramiding of terminal expenses	26
(c) Appellants' additional statistical computations	26

Page

II. Confiscation is not established in respect to a large group of separately operated railroads, as a whole, by proof which is limited to a few individual roads within such group 28

III. In making the order the Commission did not act arbitrarily or in disregard of the requirements of section 15(6) of the Interstate Commerce Act 31

(a) The claim that the Commission subordinated all other elements of reasonableness to the matter of financial needs of the southern roads 31

(b) The claim that the Commission erroneously considered southern lines' rate of return from the standpoint of operations as a whole of the respective southern roads 33

Conclusion 34

Appendix, U. S. C. Title 49, C. 1, Sections 1(4) and 15(6) 35

CASES CITED.

Aetna Insurance Co. v. Hyde, 275 U. S. 440..... 31
Atchison, T. & S. F. R. Co. v. U. S., 284 U. S. 248..... 19
Atlantic Coast Line R. Co. v. Arcade & A. R. R. Corp., 194 I. C. C. 729, 198 I. C. C. 375.....3, 24, 33
Atlantic Coast Line R. Co., v. Florida, 203 U. S. 256.. 31
Baker v. Schofield, 243 U. S. 114 28
Baltimore & O. R. Co. v. U. S., 9 F. Supp. 181....3, 10, 13
Beaumont, S. L. & W. R. Co. v. U. S., 282 U. S. 74...31, 34
Bodkin v. Edwards, 255 U. S. 221 28
Brier Hill Steel Co. v. Baltimore & O. R. Co., 83 I. C. C. 709 18
Brimstone R. & C. Co. v. U. S., 276 U. S. 104..... 34
Burch v. Railway Express Agency, 190 I. C. C. 520, 197 I. C. C. 85 .....18, 26
California Growers & S. League v. Southern P. Co., 129 I. C. C. 25 18
Chicago, M. & St. P. R. Co. v. P. U. Comm., 274 U. S. 344..... 15

Page
Columbus Gas & F. Co. v. P. U. Comm., 292 U. S. 398. 28
Florida R. R. Commission v. A. & R. R. Co., 144 I. C. C. 603 ..... 2, 33
Georgia Public S. Comm. v. A. C. L. R. Co., 186 I. C. C. 157 18
Illinois Central R. Co. v. I. C. C., 206 U. S. 441 ..... 27, 28
Illinois Commerce Comm. v. U. S., 292 U. S. 474 27
Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S 88 32
Interstate Commerce Comm. v. Union P. R. Co., 222 U. S. 541 ..... 15, 32
Iron Ore Rate Cases, 41 I. C. C. 181 18
Knott v. Chicago, B. & Q. R. Co., 230 U. S. 474 ..... 25, 30
Knoxville v. Knoxville Water Co., 212 U. S. 1 25
Louisville & N. R. Co. v. Garrett, 231 U. S. 298 31
Manufacturers Ry. Co. v. U. S., 246 U. S. 457 13
Minnesota Rate Cases, 230 U. S. 352 ..... 25, 30
Mississippi Valley Barge L. Co. v. U. S., 292 U. S. 282 ..... 31, 33
Missouri Rate Cases, 230 U. S. 474 ..... 25, 30
New England Divisions Case, 261 U. S. 184 ..... 29, 30
Northern Pacific R. Co. v. Dept. of Public Works, 268 U. S. 39 ..... 14, 15
Northern Pacific R. Co. v. North Dakota, 216 U. S. 579 25
Norton v. Larney, 266 U. S. 511 28
Railway Express Agency v. U. S., 6 F. Supp. 249 18
Republic Iron & Steel Co. v. B. & O. R. Co., 83 I. C. C. 429 18
Simpson v. Shepard, 230 U. S. 352 ..... 25, 30
Terminal R. R. Assn. v. U. S., 266 U. S. 17 30
U. S. v. Abilene & S. R. Co., 265 U. S. 274 ..... 29, 34
Virginian Ry. Co. v. U. S., 272 U. S. 658 31
West v. Chesapeake & P. Tel. Co., —— U. S. ——, 79 L. ed. 948 28
Willcox v. Consolidated Gas Co., 212 U. S. 19 25
Wood v. Vandalia R. Co., 231 U. S. 1 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 312.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., *Appellees*.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES.

Opinion of the Court Below.

The opinion of the specially constituted District Court is reported at page 181 of 9 Fed. Supp., and appears in the Record at pages 226-263. A memorandum opinion, unreported, denying an application for a stay, appears at pages 294-5 of the Record.

The Statute Involved.

The statute involved is the Interstate Commerce Act, Sections 1(4) and 15(6), U. S. C. title 49, c. 1, secs. 1(4), 15(6), reproduced in the Appendix, *infra*, pp. 35, 36.

STATEMENT OF CASE.

This is an appeal under Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. L. 208, 220, from a final decree of the United States District Court for the Eastern District of Virginia (Circuit Judge Soper and District Judges Chesnut and Way) entered December 31, 1934 (R. 269).

The decree was rendered upon a bill (R. 1), as amended (R. 146), brought by The Baltimore & Ohio Railroad Company, The Pennsylvania Railroad Company and the Richmond, Fredericksburg & Potomac Railroad Company against the United States.

The purpose of the bill was to enjoin an order of the Interstate Commerce Commission entered July 3, 1933 (R. 8), as amended by order of January 8, 1934 (R. 10), whereby the Commission prescribed the divisions to accrue to railroads as groups, operating north and south, respectively, of Richmond and Potomac Yard, Va., and the Ohio River, of joint rates theretofore prescribed in *Florida R. R. Com.* v. *A. & R. R. Co.*, 144 I. C. C. 603, on citrus fruit, in carloads, from Florida to destinations in Official Classification territory.*

Thirteen additional railroads operating in Official Classification territory intervened as complainants (R. 105).

The Interstate Commerce Commission intervened as defendant (R. 98), as did also the Atlantic Coast Line Railroad Company and other railroads which principally participate in the transportation south of the above-mentioned dividing gateways (R. 102, 154).

---

*Official Classification territory embraces, generally speaking, that portion of the United States which lies east of the Mississippi River and north of the Ohio and Potomac rivers, including portions of Virginia and West Virginia and including New England.

The District Court denied the injunction prayed for and dismissed the bill. *Baltimore & O. R. Co.* v. *United States*, 9 F. Supp. 181 (R. 226).

The Order Complained of by Appellants.

The order complained of by the appellants was made by the Commission in the proceeding entitled *Atlantic Coast Line Railroad Company, et al.* v. *Arcade & Attica Railroad Corporation, et al.*, Docket No. 24069, reported in 194 I. C. C. 729 (R. 39) and 198 I. C. C. 375 (R. 79, Report on Reconsideration). The order, as amended, provides as follows (R. 10):

> "*It is ordered*, That complainants, cross complainants, and defendants in No. 24069 and respondents in No. 24160, according as they participate in the transportation of citrus fruit from points in Florida to points in official territory upon rates prescribed in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603 shall receive on and after May 1, 1934, divisions of such rates determined as follows:
>
> "(a) The so-called Florida arbitrary contained in said rates shall first be deducted and added to the division of the southern lines, as defined in the findings in said reports, determined as hereinafter specified.
>
> "(b) On shipments other than those over the Southern Railway via Potomac Yard, Va., the remainder of the rates after deduction of the Florida arbitrary hereinabove referred to shall be divided on two percentages, one of which shall apply to the transportation north of the gateways named in the findings in said reports herein and the other to the transportation south of said gateways, the percentage of the southern lines as defined in said findings to be based on the scale of southern factors set forth in the appendix to the original report for the short-line distance from point of origin to the gateway through which the shipment moves, and the percentage of the northern lines as defined in said findings to be based on the scale of northern factors set forth in said appendix, fractions being disposed of by adding one to the percentage hav-

ing the larger decimal or, if both decimals are equal, to the percentage of the northern lines;

"(c) On shipments over the Southern Railway via Potomac Yard percentages applicable on shipments between the same points via Richmond, Va., shall be applied except that 3 shall be deducted from the percentage of the northern lines and added to the percentage of the southern lines.

"*Provided, however,* That these findings shall not be applied to divisions on shipments to points in central territory other than in West Virginia, or to points in Buffalo-Pittsburgh territory, via Virginia gateways over the Chesapeake & Ohio Railway and the Norfolk & Western Railway.

"*It is further ordered,* That said complainants, cross complainants, and defendants in No. 24069 be, and they are hereby, notified and required, on or before June 1, 1934, to adjust divisions in accordance with the method hereinabove prescribed on shipments which moved subsequent to November 22, 1930, from points in Florida to points in trunk-line territory and New England on rates prescribed in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.,* 144 I. C. C. 603.

"*It is further ordered,* That said complainants, cross-complainants, defendants and respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after May 1, 1934, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said joint rates upon other bases than those above prescribed."

The proceeding before the Commission originated with the filing, on November 22, 1930, of a formal complaint, No. 24069, by the Atlantic Coast Line Railroad Company and other railroads* which principally originate the citrus fruit traffic in Florida and participate in the transportation to Richmond or Potomac Yard, Va., (sometimes re-

*Seaboard Air Line Railway Company and its receivers, Florida East Coast Railway Company, Southern Railway Company, Georgia, Southern & Florida Railway Company, together with several smaller roads which operate entirely in Florida.

ferred to as the Virginia Gateways) when destined to points in trunk line-New England territory.*

The complaint named as defendants all roads which participate in the transportation north of the Virginia gateways, including particularly the Richmond, Fredericksburg & Potomac Railroad Company (hereinafter referred to as the "R. F. & P." and operating from Richmond to Potomac Yard, located between Washington and Alexandria, Va.), the Pennsylvania Railroad Company, hereinafter called the "Pennsylvania", and the Baltimore & Ohio Railroad Company, hereinafter called the "B. & O." The two last named roads together handle all of the citrus fruit traffic out of Potomac Yard when destined to trunk line-New England territory, and either deliver it at final destination over their own lines or deliver it to connecting roads for ultimate delivery at final destination.**

A cross complaint was filed by the defendant northern roads (R. 4).

Although the abovementioned complaint and cross complaint placed in issue the divisions of the rates to trunk line-New England territory only, the divisions of the citrus fruit rates from Florida to central territory*** were included in a general investigation later instituted by the Commission, No. 24160, of the divisions of rates on all

*Trunk Line-New England territory embraces, broadly speaking, that portion of Official Classification territory which lies on and east of a line drawn through Buffalo, N. Y., Pittsburgh, Pa., and Charleston, W. Va.

**The Commission found that in the 1928-29 shipping season the Pennsylvania received 24,123 carloads of citrus fruit at Potomac Yard, of which 18,430 carloads were delivered by it at destinations on its own rails. The B. & O. received 4,202 cars, and of these it made final delivery of 3,128 cars. Practically all of the traffic moved through Richmond via the R. F. & P. to Potomac Yard, but 2,140 cars moved into Potomac Yard via the Southern Railway and these cars did not pass through Richmond (R. 54, 55). In the division of the joint through rates between northern and southern roads both Richmond and Potomac Yard are used as dividing points, but the former is by far the more important in this respect.

***Central territory embraces that portion of Official Classification territory which lies west of trunk line-New England territory. To central territory the movement totalled 8,773 cars (R. 43). Such shipments, with a few minor exceptions, do not pass through Richmond or Potomac Yard but move via Cincinnati or other cities on the Ohio River, and these Ohio River gateways are the dividing points in the division of the joint rates.

interterritorial traffic between the South and Official Classification territory as a whole. In order to avoid duplication the complaint case, No. 24069, and so much of the general investigation, No. 24160, as related to the citrus fruit rates from Florida to central territory were heard upon one record.

The hearings before the Commission were full and extensive. The record embraced a total of 2,054 pages of testimony, with 358 documentary and statistical exhibits. Briefs were filed; a proposed report was issued by the examiner; exceptions to the proposed report and briefs in support of such exceptions were thereafter filed; and the case was thereafter argued orally before the entire Commission.

Following the issuance of the original report and order, the case was reopened and reconsidered by the Commission upon the petition of the northern roads, the appellants here. As constituting the "only additional facts" which the appellants at that time sought to have the Commission consider (R. 80), there was incorporated into the record, by stipulation, certain statistical data taken from reports on file with the Commission. This data related to the results of operation of the various interested roads for the latest available period, including the first ten months of the year 1933.

The Commission thereafter issued its Report on Reconsideration (R. 79) and its amended order dated January 8, 1934 (R. 10). In this second report each and every error asserted by appellants in their petition for rehearing was separately dealt with and overruled by the Commission, with a full statement of its reasons in each instance, and the original decision was reaffirmed. The order was amended in respect to one minor feature only, relating to certain destinations in West Virginia.

On April 27, 1934, more than three months after the date of the Commission's second report, appellants filed with the Commission a second petition for rehearing and recon-

sideration (R. 1580). In this petition it was specifically alleged that the divisions prescribed for the northern roads would be confiscatory of the property of those roads, in violation of the Fifth Amendment. The southern roads, appellees here, duly filed a written reply to this second petition (R. 132).

For the purpose of affording full opportunity for consideration of this second petition and the reply thereto, the Commission postponed the effective date of its order, as amended, for a period of thirty days. The petition was thereafter denied by the Commission in a brief order, dated May 14, 1934 (R. 95), and without further report.

Thereupon, on May 25, 1934, the bill was filed in the District Court.

The Issues on this Appeal.

From the assignment of errors (R. 273) and statement of points (R. 306), it is apparent that the contentions principally relied upon by the appellants on this appeal are the following:

1. That the District Court erred in failing to hold that the divisions prescribed by the Commission for the northern roads, the appellants here, are confiscatory of the property of those roads in violation of the Fifth Amendment;

2. The District Court erred in failing to hold that the Commission acted arbitrarily, and in disregard of the requirements of section 15(6) of the Interstate Commerce Act

(a) in failing to give "due consideration" to the appellants' revenue needs and requirements;

(b) erroneously "subordinating" all other elements of reasonableness of divisions of the joint rates to the matter of revenue needs of the southern roads;

(c) erroneously considering the rates of return of the southern roads from the entire operations of such roads, instead of rates of return on property "fairly attributable to the service of transporting citrus fruit."

Summary of Argument.

1. The southern roads, appellees, contend that appellants' basic formula for computing the purported cost of the citrus fruit transportation, used for proving the alleged confiscation, was fully presented to the Commission in their second petition for rehearing, above referred to, which petition was duly considered and denied; it was again offered, with further explanatory evidence, before the special District Court of three judges; and that both the Commission and the District Court having considered and refused to recognize the reliability of these cost calculations, their concurrent conclusions upon this question of fact will be accepted as final on appeal.

2. It is erroneous to use computed system average unit costs, including all freight of every description on large railroad systems, such as the systems of the Pennsylvania or the B. & O., as a measure of the cost of transporting a particular commodity, citrus fruit, under the particular circumstances and conditions which surround the transportation of that commodity by such roads as distinguisned from other traffic.

3. Confiscation is not established in respect to a large group of separately operated railroads, as a whole, by evidence which is limited to a few individual roads within such group.

4. In making the order complained of the Commission did not act arbitrarily or in disregard of the requirements of section 15(6) of the Interstate Commerce Act. The Commission gave full consideration to all of the elements which it is directed by the statute to consider when prescribing reasonable divisions of joint rates.

ARGUMENT.

POINT I.

Both the Commission and the District Court Having Considered and Refused to Recognize the Reliability of Appellants' Cost Calculations, Offered as Proof of the Alleged Confiscation, Their Concurrent Conclusions Upon Such Question of Fact Will Be Accepted as Final on Appeal.

1.

THE PROCEDURE ADOPTED FOR PROVING CONFISCATION.

For the purpose of proving that the prescribed divisions are confiscatory, appellants adopted a procedure of which the essential features are as follows:

First. A proposal to establish confiscation in respect to numerous separate and distinct railroads, operating north of the dividing gateways and parties to the prescribed divisions, in the aggregate and *as a group* rather than individually;

Second. The computation for this purpose of the alleged cost of transporting cars of citrus fruit for what are characterized in the bill of complaint as "particular and typical hauls" (R. 15). These include certain selected cars of citrus fruit, constituting a portion of a typical season's movement, which required single line hauls only, *i. e.*, hauls over one railroad, north of the dividing gateways,* all cars moving over two or more northern roads being eliminated from these cost calculations;

Third. The use by appellants, as the underlying basis of these cost calculations, of computed system average freight car mile costs, *i. e.*, the average cost, on the Pennsylvania system, for example, of transporting any freight car one mile, whether loaded or empty, as a measure of the cost

*For this purpose the R. F. & P., although a separate and independently operated railroad, is treated by the appellants as constituting a single line with the Pennsylvania or the B. & O.

of transporting the particular commodity, citrus fruit, to which these cost calculations relate.

As employed by the three northern roads named in the original bill, to wit, the Pennsylvania, the B. & O. and the R. F. & P., the formula is concisely described as follows in the District Court's opinion, by Circuit Judge Soper (R. 247):

> "In view of these inherent difficulties, the petitioners made no effort to ascertain the precise costs of the traffic even to the extent of a test for a limited period, but presented a cost study on a system average car mile basis in the following manner: The total freight car miles, including both loaded and empty cars, and also the total operating expenses and railway taxes, were ascertained for each petitioning carrier from the statistical reports furnished by it to the Interstate Commerce Commission, and these costs were separated as between freight and passenger traffic in accordance with a formula prescribed by the Commission for such separation. Deductions from total freight expenses were made for freight train, car repairs, depreciation, and retirements, since citrus fruit is moved in refrigerator cars, not owned by the carriers but rented at the rate of 2 cents per mile. Then the net freight expense was divided by the total freight car miles and a unit expense per car mile for all freight traffic was ascertained * * *.
>
> "Having thus obtained the system average car-mile cost, the petitioners adopted it as the cost applicable to the carriage of citrus fruit, not indeed as representing the exact costs, but as indicating a figure less than the actual expense incurred in the moving of this kind of traffic."

The court further stated:

> "These unit figures were applied to shipments of citrus fruit from Florida to destinations in official territory during the 1928-1929 shipping season, which is conceded to be a typical period. 29,221 cars were shipped to that part of official territory lying east of central territory, and of this number, 17,324 were used

in the calculation, being all of the cars which originated on the Atlantic Coast Line and the Seaboard Air Line, and were moved via Richmond northerly by single-line hauls to destinations on the Pennsylvania or the Baltimore & Ohio Railroad. Cars originating on the Florida East Coast and cars delivered at destination by roads other than the Pennsylvania Railroad and the Baltimore & Ohio Railroad were omitted, because they involved a two or more line haul north or south. Cars moving via Southern Railway and Potomac Yard were omitted for the same reason. Multiple line hauls were eliminated because of the difficulty in making proper allowance as to such hauls for the element of terminal costs of the line involved (R. 251)."

By the foregoing process appellants reached the conclusion, as set forth and alleged in the amended bill (R. 146), that out of total revenues accruing to the three northern roads under the prescribed divisions of $1,247,237.52, on the 17,324 cars used in the studies, the operating expenses, plus an allowance for taxes, would have exceeded the revenue received by $65,578.90 in the case of the Pennsylvania; by $1,259.56 in the case of the R. F. & P.; while for the B. & O. there would be a surplus of $13,368.67 over operating expenses and taxes on the 3,128 cars delivered by that carrier.

Fourth. As substantiating the above-mentioned use of "system average" car mile costs for computing the costs of the citrus fruit traffic, appellants additionally rely upon:

(a) Testimony of railroad operating officers and others descriptive of special services and expenses incident to the transportation by appellants of citrus fruit, a perishable commodity, as contrasted with other traffic;

(b) Statistical computations designed to show that operating costs per unit of all freight traffic for certain sections of the B. & O. and Pennsylvania systems, parts of which sections were utilized by the citrus

fruit movement are higher than the corresponding costs for the respective systems as a whole.

Cost calculations, similarly computed on a system average car mile basis, were made also with respect to 4,662 cars which moved in single-line hauls north of the Ohio River gateways to central territory, constituting a portion of the total movement of 8,773 cars to that territory (R. 252).

No cost data at all was submitted with respect to the following roads, namely, Boston & Maine, New York Central, Pittsburgh & Lake Erie, New York, New Haven & Hartford, Central Railroad Company of New Jersey, Reading Company, Lehigh Valley, Delaware, Lackawanna & Western, Delaware & Hudson and Pere Marquette, interveners in the District Court and appellants here, although all of these roads participate via various routes in the citrus fruit movement and in the prescribed divisions north of the dividing gateways (R. 253, 1337).

Fifth. As a basis for determining the investment assignable to the citrus fruit transportation a division of total operating expenses, for the B. & O., Pennsylvania and R. F. & P., respectively, as reported to the Commission for the year 1929, was first made between freight and passenger operations in accordance with a formula devised by the Commission. The item "Investment in Road and Equipment" was then allocated to freight operations in the same proportion which the freight operating expenses were thus found to bear to total operating expenses, certain deductions being first made to cover car retirements and depreciation because the citrus fruit moves almost entirely in refrigerator cars not owned by the railroads (R. 247, 1233-4).

2.

Appellants' Basic Formula for Computing Costs of the Citrus Fruit Transportation Was Fully Placed Before the Commission and Was Rejected After Due Consideration by the Commission.

In the District Court's opinion it is stated (R. 243):

> "The most important part of the evidence in statistical form now before us was placed in the hands of the Commission with the second petition for rehearing; but after consideration thereof, the petition was denied without opinion in a brief order, and it seems certain that a submission to the Commission of all the evidence that we have heard would have been followed by the same result."

This second petition for rehearing before the Commission (reproduced at R. 1580) was a document of 54 printed pages, a part of which was an affidavit by a statistician for the northern roads. This affidavit set forth in full, for proof of the confiscation which was specifically alleged in the petition, appellants' computed unit costs per car mile of transporting citrus fruit, for the Pennsylvania, the B. & O. and the R. F. & P., respectively, together with the formula which was used in computing these alleged costs and a full explanation of this formula.

The petition was obviously filed in such form for the very purpose, among other things, of avoiding possible criticism on account of failure to lay before the Commission the evidence relied upon as showing the confiscation alleged, in advance of attacking the order upon that ground in the courts. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489, 62 L. ed. 831.

Both the formula itself and the resulting figures thereby obtained and set out in the petition before the Commission are precisely the same formula and figures which were later set forth in the bill of complaint and offered in evidence before the District Court by the three original complainant

roads (R. 18; R. 1592).* The underlying basis of the computation was the use of computed "system average" car mile costs, including all traffic of every description of such railroad systems as the Pennsylvania and the B. & O., for estimating the cost per car mile of the citrus fruit transportation over the particular and limited portions of those systems which were utilized in that transportation (R. 1612-13).

All of the statistical data used in these computations was already a part of the record before the Commission, consisting of reports on file with the Commission that had been incorporated by stipulation (R. 1549).

That record likewise contained already a vast amount of statistical evidence respecting the cost of the citrus fruit transportation, as well as evidence descriptive of the particular conditions under which the citrus fruit is handled by the railroads, both north and south of the dividing gateways, including the special services and expense incident to the movement of that traffic both over the line and in terminals. The various elements of such special expense are set forth and described at length in the Commission's first report (R. 39, 55, 57).

Upon the face of this petition, therefore, and in the light of the evidence already of record and the facts found and stated in the reports previously issued, the Commission was enabled to visualize the fundamental and vitiating defect in the cost calculations offered as proof of the alleged confiscation. This defect consists of the erroneous use, as measuring the unit cost of transporting a single commodity, citrus fruit, of a computed *average* unit cost for all freight of every description handled by large railroad systems in their entirety, such, for example, as the systems of the Pennsylvania and the B. & O.

Northern Pacific R. Co. v. *Dept. of Public Works*, 268 U. S. 39, 69 L. ed. 836;

*Compare also Exhibit No. 1, attached to the petition before the Commission (R. 1622), and appellants' Exhibit No. 1 (Hodkinson) offered before the District Court, which was sent up with the record and separately printed.

Chicago, M. & St. P. R. Co. v. *Public Utilities Commission*, 274 U. S. 344, 71 L. ed. 1085;
Wood v. *Vandalia R. Co.*, 231 U. S. 1, 58 L. ed. 97;
Interstate Commerce Commission v. *Union P. R. Co.*, 222 U. S. 541, 56 L. ed. 308.

In the case first cited an order of the Department of Public Works of Washington, prescribing rates on logs, was set aside as arbitrary and unsupported by evidence, and therefore a denial of due process, because grounded upon the use by the state regulatory body of a computed system average "gross ton mile" cost of the railroads for estimating the cost of the log transportation. In the opinion, speaking through Mr. Justice Brandeis, the Court stated as follows:

> "In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. The Department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion."
> *Northern P. R. Co.* v. *Department of Public Works*, 268 U. S. 39, 44.

The record before the Commission in the instant case is replete with evidence showing the peculiar impropriety of

such use of system average unit costs for computing the cost of the citrus fruit shipments, when the particular circumstances which surround the transportation of that traffic are considered. The Commission's original report includes, among others, the following findings pertinent to this subject:

> "In 1928-31, of the gross freight revenue of the eastern carriers 74 per cent was derived from products of mines, manufactures and miscellaneous carload freight." (R. 74);
>
> "In the eastern group only 0.36 per cent of the gross freight revenue came from citrus fruit." (R. 74);
>
> "To a great extent it (citrus fruit) is what may be termed concentrated traffic, in that it moves from a fairly compact producing area mainly to the most populous cities in the North." (R. 54);
>
> "About 73 per cent of the shipments were to the following destinations, the number of cars to each also being shown: New York 11,358, Philadelphia 4,772, Boston 2,989, Chicago 2,380, Pittsburgh 1,751, Baltimore 1,715, Cleveland 1,348, Detroit 1,319." (R. 54);
>
> "In 1928-29 the Pennsylvania received 24,123 carloads of citrus fruit at Potomac Yard, and delivered 18,430 of these to final destinations on its own rails. In the same period the Baltimore & Ohio received 4,502 cars and made final delivery of 3,128 of these." (R. 55);
>
> "During the height of the shipping season from November to May, it appears from a chart based on the 1928-29 season that the Pennsylvania seldom received less than 50 cars of citrus fruit per day at Potomac Yard and frequently as many as 200 cars." (R. 58);
>
> "During the height of the citrus reason the Pennsylvania operates solid trains of perishables from Potomac Yard to New York." (R. 58).

From the record before it the Commission saw, therefore, that citrus fruit constitutes a very small percentage only of the total freight of such railroads as the Pennsylvania and the B. & O.; that those roads handle large volumes of other freight, such as "products of mines", including coal and ore, which load far more heavily per car; that the cars of citrus fruit used in the cost calculations, *i. e.*, those cars which the Pennsylvania or the B. & O. received at Potomac Yard and delivered over their own rails —principally at New York and several other eastern cities —utilized very small segments only of the total mileage of these large systems as a whole; that the portions thus utilized consist of main lines of relatively heavy traffic density, such, for example, as the Pennsylvania's line between Washington and New York City; that the citrus fruit is moved north of Potomac Yard in large volume; and that to a very considerable extent it is moved in *solid train loads* of citrus fruit and other perishable fruits, vegetables and melons which are brought in from the south and concentrated at Potomac Yard for movement beyond by the Pennsylvania or the B. & O.

The foregoing facts, together with many others of record before the Commission, plainly served to vitiate and destroy the underlying basis of the cost data set forth in the second petition for rehearing. The Commission could readily reach the conclusion that under the particular circumstances surrounding the citrus fruit movement, used in the cost calculations in the petition, the *average* unit cost of all freight of every description on the Pennsylvania or the B. & O. systems as a whole, including both main lines and branch lines, would be simply meaningless as applied to this citrus fruit transportation, and this regardless of whether such unit costs are computed on a "car mile" or a "gross ton mile" basis.

The Commission had in other cases repeatedly rejected as untrustworthy cost calculations relating to individual commodities, similarly computed by the use of average

unit costs on all freight of large railroad systems.*. Indeed the Commission had theretofore very recently had occasion to condemn another cost study, computed on a system average unit cost basis, which was offered to prove confiscation in respect to rates prescribed on strawberries moving by freight and express—over the same lines of the Pennsylvania or the B. & O. north of Potomac Yard over which the citrus fruit moves—from Florida to New York and other eastern cities. *R. W. Burch, Inc.* v. *Railway Express Agency, Inc.,* 190 I. C. C. 520, 197 I. C. C. 85. In criticizing this cost study the Commission stated:

> "An outstanding defect in the study is that there is no separation of line haul and terminal costs, the amount of each being reduced to an average per passenger-train car-mile, thus including the terminal as well as the line-haul factor in the average car-mile cost. A terminal factor is constant, independent of and unaffected by the distance a car is handled, whereas a line-haul factor is so affected and therefore a variable quantity. The effect of including both factors in the average car-mile cost and applying the latter to hauls of various distances is to make equally variable and thus pyramid the terminal factor. * * * The study also questionably assumes that it costs as much to haul an empty car as a loaded one, and that system car-mile cost is representative of the cost on the main lines of heavy-density, or relatively heavy-density, traffic over which this strawberry traffic principally moves."
>
> *R. W. Burch, Inc.* v. *Railway Express Agency, Inc.,* 190 I. C. C. 520, 535.**

The Commission granted the prayer of this second petition for rehearing to the extent of postponing the effective

---

**Iron Ore Rate Cases,* 41 I. C. C. 181; *Republic Iron & Steel Co.* v. *B. & O. R. R. Co.,* 83 I. C. C. 429; *Brier Hill Steel Co.* v. *B. & O. R. R. Co., id.* 709; *California Growers & Shippers' Protective League* v. *S. P. Co.,* 129 I. C. C. 25, 52; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.,* 186 I. C. C. 157, 183.

***A bill to enjoin the Commission's order was thereafter filed in the District Court for the Southern District of New York. The special court of three judges denied the injunction and dismissed the bill. *Railway Express Agency* v. *United States,* 6 F. Supp. 249.

date of its order for a period of thirty days (R. 1628), thus affording ample opportunity for consideration of the petition and the southern lines' reply thereto. The Commission thereafter, by a divided vote (R. 1629), denied the petition in a brief order and without writing still another, or third, report. The order recites that this denial was made:

> "upon consideration of the record in the above-entitled proceeding and of the second petition for rehearing, reconsideration and reargument" (R. 95).

The Commission's denial of this petition is not assigned as error on this appeal, as in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248, 76 L. ed. 273 (Assignment of errors, R. 273).

3.

THE DISTRICT COURT ALSO, AFTER HEARING ADDITIONAL EVIDENCE, REFUSED TO RECOGNIZE THE RELIABILITY OF APPELLANTS' COST CALCULATIONS OFFERED AS PROOF OF THE ALLEGED CONFISCATION.

The entire record before the Commission was introduced in evidence at the hearing before the District Court. The court adopted the view, as stated in the opinion, that where confiscation is alleged in respect to an order of the Commission the complaining party is entitled to "the independent judgment of the court on both the questions of law and the questions of fact involved"* (R. 243).

Accordingly, in addition to the evidence offered before the Commission and the statistical exhibits which constituted a part of the second petition for rehearing above referred to, appellants were permitted by the court to intro-

*Citing: *United States* v. *Louis. & Nash. R. Co.,* 235 U. S. 314; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *United States* v. *New River Co.,* 265 U. S. 533; *Assigned Car Cases,* 274 U. S. 564; *New England Divisions Case,* 261 U. S. 184; *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461.

duce further evidence, both oral and documentary, in support of the exhibits mentioned; as well as statistical exhibits and explanatory testimony relating to the carriers in central territory, interveners (R. 243). Evidence in rebuttal, both orally and in exhibit form, was introduced also by the southern roads.

The facts thus placed in evidence before the District Court were in the main undisputed. The controversy concerned the conclusions to be drawn therefrom, as bearing upon the reliability of appellants' cost calculations and supporting data offered as proof of the alleged confiscation.

The court summarizes in the opinion the facts thus presented by the northern and southern roads, respectively (R. 247, 254). The court also referred to the Commission's statement in its report that "the evidence before it in general indicated that citrus fruit, like other perishable traffic, is given a specialized expedited service, which is undoubtedly more expensive than the ordinary run of freight." It was added that "counsel for the southern lines conceded the correctness of this general conclusion" (R. 248).

But regardless of the well recognized and admitted fact that the transportation in general of citrus fruit, like other perishable commodities, requires many special and expensive services as contrasted with "the ordinary run of freight", such, for example, as the provision of special equipment, expedited schedues and the like, the court reached the same conclusion which had obviously caused the Commission to reject the second petition for rehearing. This conclusion was that appellants' cost calculations are fatally defective because predicated upon the underlying assumption that average system unit costs of all movements of all freight can properly be used as a measure of the citrus fruit cost, when *all* of the elements of such cost are included and considered.

Among the uncontroverted facts of record before the District Court supporting this conclusion are the follow-

ing, most of which are set out in full in the court's opinion*:

1. The Pennsylvania system covers a wide territory and embraces a total of over 10,000 miles of railroad, including main lines as well as a vast network of what may be termed branch lines. The B. & O.'s system embraces approximately 6,000 miles (R. 254; R. 1421, 1517);

2. Citrus fruit represented in 1929 less than .3 of 1 per cent of the total tonnage of all freight of the Pennsylvania's system; and less than .5 of 1 per cent of the B. & O.'s total tonnage (R. 254; R. 1424);

3. On the Pennsylvania the average loading of the citrus fruit was 16.79 tons per car. The average loading of all freight was 37.99 tons per car. The figures for the B. & O. are approximately the same (R. 254; R. 1426);

4. In the same year 60.71 per cent of the total tonnage of the Pennsylvania was composed of "products of mines" alone. On this traffic the average loading was 55.22 tons per car (R. 254; R. 1425);

5. In the 1928-29 shipping season more than 29,000 carloads of citrus fruit moved via Potomac Yard to trunk line-New England destinations. All of the cars were handled out of Potomac Yard by the Pennsylvania, except 4,502 cars which were moved via the B. & O. (R. 228; R. 362);

6. The 17,324 cars included in appellants' cost calculations utilized, in the movement north of Potomac Yard to New York City, the largest receiving point, less than 2 per cent of the Pennsylvania's system mileage; and in the movement to Buffalo, the most distant

*Page references to the record at this point are to both the District Court's opinion and the evidence offered before the court.

point, only about 4 per cent of the system mileage (R. 1422);

7. The 17,324 cars moved principally to several of the larger cities in the east. For example, appellants' exhibits* show that 15,702 of the cars were consigned to five cities alone, namely, New York, Philadelphia, Baltimore, Jersey City and Pittsburgh. The remaining cars went to a number of smaller points which are reached, almost without exception, by the main lines of the Pennsylvania or the B. & O. operating directly from Potomac Yard (R. 255; R. 1517);

8. The 17,324 cars in their entirety utilized, including all points which received as many as 10 cars during the season, less than 15 per cent of the system mileage as a whole in the case of either the Pennsylvania or the B. & O. (R. 254; R. 1517);

9. The lines of both the Pennsylvania and the B. & O. thus utilized by the citrus fruit movement are lines having a very heavy density, or volume, of both freight and passenger traffic, as contrasted with other portions of those systems or with the systems as a whole (R. 256; R. 1518);

10. More than 100,000 cars of citrus fruit and other perishables, such as peaches, vegetables and melons, moved into and through the Potomac Yard from the south annually during the period 1928 to 1930 (R. 256; R. 1361);

11. The Pennsylvania operated solid trains of citrus fruit and similar perishables from Potomac Yard as and when the volume of the traffic justified. During the height of the shipping season it operated daily at least one, and generally two, such solid trains directly from Potomac Yard to its terminals at Jersey City for New York delivery (R. 256; R. 1361; 1478);

*Appellants' Exhibit Hodkinson, No. 10.

12. It is generally recognized in railroad cost accounting that on any given line of road (1) about two-thirds of operating expenses assignable, under the Commission's accounting rules, to "maintenance of way and structure", (2) 43 per cent of the "maintenance of equipment" expense, and (3) a very substantial portion of the "transportation" expense, remains constant, *i. e.*, unaffected by use or volume of traffic (R. 256; R. 1522).

The foregoing facts, among many others of record here, differentiate the unit cost of the particular citrus fruit transportation here in question from the average unit costs of all freight of every description on the Pennsylvania or B. & O. systems in their entirety. They demonstrate that such system average costs mean simply nothing at all for the purpose of measuring the actual cost of this citrus fruit transportation. The use of such system average figures, as the underlying basis of their cost calculations, "vitiates the whole process of reasoning" by which the appellants seek to prove confiscation (*Northern Pacific Case, supra*). The District Court correctly characterizes appellants' cost data in its entirety as "a statistical generalization of uncertain meaning" (R. 259).

4.

APPELLANTS' SUPPORTING EVIDENCE OFFERED BEFORE THE DISTRICT COURT FAILS TO JUSTIFY THEIR USE OF COMPUTED SYSTEM AVERAGE UNIT COSTS.

(a) *Effect of traffic density upon transportation costs per unit of traffic.*

At the hearing before the District Court appellants questioned the effect of the relatively heavy traffic density of particular segments or portions of a railroad system upon the operating costs per unit of freight on such segments, as distinguished from the system as a whole, which latter

includes numerous main lines and branch lines, some of light and others of heavy traffic density. They relied greatly upon the following expression in the Commission's report:

> "Defendants call attention to the fact that greater density of traffic may entail higher capital expenditure as well as greater operating difficulties particularly at terminals, as we ourselves have had occasion to point out (R. 63)."

The Commission here merely recognized what is indeed obvious, namely, that if a given railroad, or any particular portion thereof, is fortunate enough to secure a large volume of freight this may entail an increase in capital outlay, such as the provision of more tracks and equipment. It may sometimes occasion also greater operating difficulties in the physical handling of trains over the line and in terminals. The Commission fully recognized also that such physical handling of the citrus fruit traffic involves many items of special expense—included among what are sometimes referred to as "overhead" or "out-of-pocket" expenses—which are not encountered in connection with the "ordinary run of freight" (Commission's Report, R. 73).

But when such capital outlay has once been made the item of necessary return upon investment remains constant. A large part of the operating expenses chargeable to "maintenance of way and structures", "maintenance of equipment" and "transportation" likewise remains constant and unaffected by use, or volume of traffic. It follows inevitably that the greater the number of units of traffic handled, whether expressed in carloads or in tons of freight, the smaller is the cost per unit of traffic. Appellants' error in this connection consists of their failure to take into account *all* of the elements of operating cost, when statistically computed, as distinguished from what constitute

merely the surface or out-of-pocket expenses pertaining to the physical handling of trains.

Even with respect to such train operations they also take no account of the tremendous saving of expense which arises out of the Pennsylvania's ability, because of the large volume of the citrus fruit traffic, to operate solid trains of citrus fruit, or citrus fruit and similar perishable commodities, from Potomac Yard directly to New York City, thus avoiding the expense incident to the break up of trains at intermediate terminals.

The Court has repeatedly emphasized the danger, where confiscation is alleged in respect to rates prescribed by governmental authority, of reliance upon mere expressions of opinion as a substitute for concrete data, even though they be the opinions of experts in public utility operation. Especially is this true where no actual or adequate tests have been made.

> *Northern P. R. Co.* v. *North Dakota,* 216 U. S. 579, 580, 54 L. ed. 624;
> *Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U. S. 352, 466, 57 L. ed. 1511;
> *Missouri Rate Cases* (*Knott v. Chicago, B. & Q. R. Co.*), 230 U. S. 474, 507, 57 L. ed. 1571;
> *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17, 18, 53 L. ed. 371;
> *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 42, 53 L. ed. 382.

The instant case strikingly typifies the propriety of the rule. The opinion evidence here relied upon by the appellants consists principally of the testimony of railroad operating officers (Appellants' brief, p. 49). The duties of such men pertain exclusively to the physical handling of trains over the line and in terminals. Such witnesses have but little concern or familiarity with the elements as a whole which enter into the actual cost in its entirety of conducting transportation, including maintenance of road-

way and structures, maintenance of equipment, as well as a reasonable return upon capital outlay.

(b) *"Pyramiding" of terminal expenses*

Appellants also contended that their cost calculations involve no "pyramiding" of terminal costs—to use the Commission's expression in the *R. W. Burch Case, supra*—growing out of the failure to segregate terminal from line haul expenses in computing the system average unit cost on a car mile basis.

As the Commission observed in the case cited, the terminal factor of the expense of transporting any car, whether loaded or empty, is constant, regardless of the length of haul. The line haul factor, on the other hand, varies with the length of haul. The computation of an average car mile cost, with no segregation of terminal from line haul expenses, involves the erroneous assumption that both factors are constant and thus distorts the resulting average figure.

The northern roads sought to show that there is no such "pyramiding" in this instance on the theory that on the cars of citrus fruit used in the cost calculations the average haul on the Pennsylvania, for example, was approximately the same as the average haul of all traffic on the system as a whole. But according to their own testimony and exhibits (R. 255, 1429) if the Pennsylvania's hauls both loaded and empty are included, as they should be, the average on the citrus fruit is nearly one-third greater than the system average. The result is that to this extent yard and terminal expense—which for the Pennsylvania System amounted in 1929 to approximately $128,000,000 (R. 255, R. 1432)—is erroneously allocated to the citrus fruit transportation in appellants' cost calculations.

(c) *Appellants' additional statistical computations.*

Statistical computations were additionally offered by appellants, designed to show that on the "Baltimore Divi-

sion" of the B. & O., and the "Eastern Region and New York Zone" of the Pennsylvania, the costs per unit of all freight exceed the system average unit costs in each instance. These unit cost calculations were admittedly made in the same way in which appellants' other cost calculations are compiled (Appellants' brief, p. 110). They are, therefore, subject to the same fundamental and vitiating defects, hereinbefore referred to. They are refuted also by data appearing in the Pennsylvania's own report to its stockholders for the year 1929, as mentioned in the District Court's opinion (R. 257).

It appears in this case that the Commission—a "tribunal appointed by law and informed by experience", *Illinois Central R. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 441, 454—has considered and refused to adopt or rely upon appellants' cost calculations, offered in the second petition for rehearing before the Commission. The question whether this cost data reliably establishes the actual cost of the citrus fruit transportation is a question of fact, the determination of which is within the competence of the Commission. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 78 L. ed. 1371, wherein the Commission had denied a petition to reopen the case for the receipt of additional and supplementary cost data offered by the railroads. The Court said, in the opinion by Mr. Justice Stone (at p. 481):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission."

After hearing additional evidence, much of which was merely cumulative of the record before the Commission, the District Court also concluded that appellants' cost data is thoroughly unrepresentative and untrustworthy.

Both the Commission and the District Court having thus considered and refused to recognize the reliability of these cost calculations, it is submitted that the case falls within the settled rule that such concurrent conclusions upon issues of fact, even where confiscation is alleged, will be accepted as final on appeal.

Illinois Central R. Co. v. *Interstate Commerce Comm.*, 206 U. S. 441, 51 L. ed. 1128;
Columbus Gas & Fuel Co. v. *Public Utilities Commission*, 292 U. S. 398, 78 L. ed. 1327;
West v. *Chesapeake & P. Telephone Co.*, — U. S. —, 79 L. ed. 948 (Adv. Ops. Oct. Term, 1934);
Norton v. *Larney*, 266 U. S. 511, 69 L. ed. 413;
Bodkin v. *Edwards*, 255 U. S. 221, 65 L. ed. 595;
Baker v. *Schofield*, 243 U. S. 114, 61 L. ed. 626.

Point II.

Confiscation is Not Established in Respect to a Large Group of Separately Operated Railroads, as a Whole, by Proof Which is Limited to a Few Individual Roads Within Such Group.

With respect to the 17,324 cars included in the cost calculations concerning the divisions to trunk line-New England territory, the amended bill set forth the amounts of revenue accruing to the R. F. & P., on the one hand, and the Pennsylvania or the B. & O., on the other, in the apportionment, or subdivision, among themselves of the total revenue north of the Virginia gateways under the prescribed divisions (R. 146).

The basis of such subdivision was not prescribed or fixed by the Commission. On the contrary, it was admittedly fixed by voluntary agreement (R. 1331). It was not alleged in the bill, nor was any evidence offered to show, that such subdivision is a reasonable one, or that one road or the other may not receive too much or too little of the total revenue (R. 1332).

The thirteen intervening northern railroads are roads which, as delivering or intermediate carriers, participate with the Pennsylvania or the B. & O. in the transportation to ultimate destinations in trunk line-New England territory; or participate, as delivering or intermediate carriers, in the transportation to central territory north of the Ohio River.

There is neither allegation nor proof that the portions received by any of these delivering or intermediate roads out of the prescribed divisions are reasonable. Moreover, where two or more roads participate in the transportation beyond the lines of the Pennsylvania or B. & O.,—for example, on shipments to Portland, Maine—appellants neither alleged nor proved how much of the total revenue was received by each such road in the subdivision of the prescribed divisions north of the primary dividing gateways (R. 253, 1331).

With respect to ten roads which participate in the citrus fruit transportation—including, for example, such important roads as the New York Central and the New York, New Haven & Hartford—no cost calculations at all were offered before the District Court as proof that the prescribed divisions are confiscatory (R. 253, 1336).

It is in reliance upon allegations and proof of such character that appellants are here asserting that they are entitled to protection against confiscation of their properties "in the aggregate" or upon a "group" basis; that is to say, that confiscation may be proved in respect to all railroads within the group by evidence which is confined to a few individual roads only.

This contention is grounded upon the theory that because the Court has upheld the Commission's power to prescribe divisions of joint rates for the future by primary gateways, and for the respective groups of roads on either side of such gateways, *New England Divisions Case*, 261 U. S. 184, *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, it follows that divisions may in like manner be proved confisca-

tory as to such railroads by groups, instead of individually.

The contention involves nothing more than a transparent failure to differentiate between the legislative function of fixing rates or divisions for the future, on the one hand, and the judicial function, on the other hand, of determining whether rates or divisions are confiscatory. The division of joint rates by the Commission is a legislative and not a judicial function. *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 69 L. ed. 150.

Appellants have cited no decision of any court in which this novel method of proving confiscation has been upheld. Indeed, it was frankly admitted by counsel before the District Court that they were asking the court to adopt a new theory and make "new law" concerning confiscation.

The theory in fact runs directly counter to the decisions of this Court. It is quite true that the Commission, in exercising the legislative function of prescribing divisions for future application, may deal with such divisions upon a group basis, and may prescribe the divisions of joint rates by "primary" gateways only. Even this may be done, however, only upon evidence which is "typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier." *New England Divisions Case*, 261 U. S. 184, 197. But as far back as in the *Minnesota Rate Case* the Court stated that when confiscation is alleged in respect to rates fixed by governmental authority "each case must rest upon its special facts", *Simpson* v. *Shepard*, 230 U. S. 352, 434; and in the *Missouri Rate Cases* the Court said, speaking through Mr. Justice (now Mr. Chief Justice) Hughes:

> "The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory."
>
> *Missouri Rate Cases* (*Knott* v. *Chicago, B. & Q. R. Co.*), 230 U. S. 474, 508.

To the same effect are:

Beaumont, S. L. & W. R. Co. v. *United States,* 282 U. S. 74, 75 L. ed. 221;
Aetna Insurance Co. v. *Hyde,* 275 U. S. 440, 72 L. ed. 357;
Louisville & N. R. Co. v. *Garrett,* 231 U. S. 298, 58 L. ed. 229;
Atlantic Coast Line R. Co. v. *Florida,* 203 U. S. 256, 51 L. ed. 174.

For the foregoing additional reasons, therefore, it is submitted that the case for the appellants is clearly without merit.

POINT III.

In Making the Order the Commission Did Not Act Arbitrarily or in Disregard of the Requirements of Section 15(6) of the Interstate Commerce Act.

(a) *The claim that the Commission subordinated all other elements of reasonableness to the matter of financial needs of the southern roads.*

The first two points upon which appellants rely in this connection may be considered together. These are the propositions (a) that the Commission "subordinated" all other elements of reasonableness of the divisions to the matter of financial needs of the southern roads; and (b) failed to give "due consideration" to the appellants' revenue needs and requirements.

Both are diametrically opposed to the frequently repeated rule that upon issues of this sort the Court will neither undertake to weigh the evidence before the Commission nor concern itself with the "correctness of the Commission's reasoning" or the "soundness of its conclusions". *Virginian R. Co.* v. *United States,* 272 U. S. 658, 666, 71 L. ed. 463.

Mississippi Valley Barge L. Co. v. *United States,* 292 U. S. 282, 78 L. ed. 1260;

Interstate Commerce Commission v. *Union P. Co.*, 222 U. S. 541, 56 L. ed. 308;
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431.

Both propositions are refuted also by the Commission's findings and the plain language of the Commission's reports. In the original report the Commission stated:

> "The statute empowering us to prescribe divisions lists a number of elements to which we 'shall give due consideration among other things' but does not specify any one of these elements as of paramount importance. Nor do the decisions of the courts. The Supreme Court has said that we must consider the financial condition of the carriers but are not required to make that the only test" (R. 74).

Upon the face of the two reports it appears that the Commission did carefully consider the financial needs of the northern and southern roads, respectively, as it was in duty bound to do under the mandate of the statute (R. 68, 75). But it appears also that the Commission additionally gave full consideration to many other matters such, for example, as (a) the history of the divisional arrangements between the respective groups of roads (R. 42-45); (b) importance of the citrus fruit tonnage and revenue to the northern and southern roads, respectively (R. 74); (c) mileage, or length of haul (R. 72); (d) operating costs, both general and in connection with the citrus fruit transportation (R. 55-62, 63-67); (e) efficiency of operation (R. 68); (f) importance of the transportation service to the public (R. 42, 43, 56)—indeed, to every element which is specified in the statute, as well as many others not specifically designated therein.

The Commission found, among other things, that for nearly twenty years prior to November 9, 1928, the joint rates on citrus fruit had been divided on a basis mutually agreed upon between the northern and southern roads (R. 44); that on the date mentioned the joint rates were re-

vised pursuant to the order in *Florida Railroad Com.* v. *A. & R. R. Co.*, 144 I. C. C. 603, and to trunk line-New England destinations they were *reduced* 67 cents per ton on the average (R. 43); that the northern roads, appellants here, nevertheless immediately demanded *increases* in their divisions north of the Virginia gateways (R. 45); and that the northern roads, being the delivering carriers and therefore the collectors of the freight charges, proceeded to enforce this demand by retaining such amounts out of the total charges as they saw fit to retain in the settlement of the accounts between the respective parties (R. 45, 46). The Commission stated (R. 71):

> "The amounts now received by the southern lines from this citrus fruit traffic have been fixed solely by the defendants, 'availing themselves of their strategic position as collectors of the freight,' as the Supreme Court described the situation of these lines in *Alton R. Co.* v. *United States*, 287 U. S. 229, 236."

There is no allegation here that appellants were not accorded a full hearing by the Commission; or that the Commission's order is unsupported by evidence; or that the Commission failed to weigh and consider carefully the great mass of evidence which was before it. Peculiarly appropriate to this proceeding is the language used by the Court in the *Mississippi Valley Barge Line Case, supra,* in the opinion by Mr. Justice Cardozo:

> "In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report." *Mississippi Valley Barge L. Co.* v. *U. S.*, 292 U. S. 282, 287.

(b) *The claim that the Commission erroneously considered southern lines' rate of return from the standpoint of operations as a whole of the respective southern roads.*

Appellants' contention in this respect is refuted by the plain language of the statute. Under the provisions of sec-

tion 15(6), among the elements which the Commission must consider in *any* case which involves the prescription of divisions of joint rates is:

> "* * * the amount of revenue required to pay their (the carriers concerned) respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation."

This Court has stressed repeatedly the positive duty resting upon the Commission in any such case to consider the general revenue needs of the respective interested carriers, as bearing upon their ability to maintain in the public interest an adequate system of transportation.

> *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 75 L. ed. 221;
> *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 72 L. ed. 487;
> *United States v. Abilene & S. R. Co.,* 265 U. S. 274, 68 L. ed. 1016.

It may be added, as the District Court mentions (R. 261), that the contention is grounded upon alleged abnormally large returns to the southern roads under the prescribed divisions, which returns are erroneously computed by using the same defective and indefensible formula, hereinbefore referred to, which the appellants used in computing their own alleged costs of the citrus fruit transportation.

Conclusion.

For the reasons stated it is submitted that the decree of the District Court should be affirmed.

Respectfully submitted,

W. N. McGehee,
Charles Clark,
James F. Wright,
Frank W. Gwathmey,
Attorneys for Atlantic Coast Line RR. Co., et al., Appellees.

December 12, 1935.

APPENDIX.

The Statute Involved.

U. S. C. Title 49, Ch. 1, Sections 1(4) and 15(6).

1(4). It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

15(6). Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportaton of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential, or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are oper-

ated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.